APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellant--Cross-Appellee,

v.

JOHN MMAHAT, ET AL.,

Defendant-Appellee--Cross-Appellant.

Crim. A. No. 93-490 SECTION "N"

United States District Court, E.D. Louisiana

Sept. 28, 1994, Decided

Sept. 28, 1994, Filed; Sept. 29, 1994, Entered

JUDGES: CLEMENT

OPINION BY: EDITH BROWN CLEMENT

OPINION: ORDER AND REASONS

Defendant William Mulderig has asked this Court to dismiss the indictment against him on the grounds of undue pre-indictment delay. After thorough consideration of the issues involved, the Court determines that Mr. Mulderig's motion should be DENIED.

The Court first must address the issue of what legal standard to apply to Mr. Mulderig's motion. The defendant, citing *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982), and several other

Fifth Circuit cases, argues for application of a balancing test wherein the Court would weigh the amount of actual prejudice to the defendant against the government's reasons for delay, and dismiss the case when it felt that the government's reasons were not sufficiently compelling. The government insists that the Court must not dismiss the indictment unless it finds that the government intentionally delayed bringing criminal charges against the defendant in order to gain some tactical advantage.

The Court finds that applicable case law supports the government's position. In the recent case of *Beszborn v. United States*, 21 F.3d 62, 65 (5th Cir. 1994), the Court of Appeals stated explicitly that:

> The burden of proving a due process violation is on the defendant, who must prove that (1) the prosecutor intentionally delayed the indictment to gain a tactical advantage and (2) the defendant incurred actual prejudice as a result of the delay.

The same court has repeated this statement of the law, virtually verbatim, in two subsequent cases. *See United States v. Neal*, 27 F.3d 1035, 1041 (5th Cir. 1994); *United States v. Byrd*, --- F.3d ---, 1994 WL 475833 (5th Cir. (La.)), decided September 1, 1994. Notwithstanding the factual differences that distinguish them from Mr. Mulderig's situation, these cases are sufficient to convince the Court that the only question it must consider is whether the government intentionally delayed indicting Mr. Mulderig in order to gain a tactical advantage in the contemplated criminal prosecution.[1]

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[1] It has already been held that Mr. Mulderig suffered actual, substantial prejudice as a result of the pre-indictment delay. *See* decision of Judge Berrigan, September 6, 1994.

The Court finds that the government did not intentionally delay indicting Mr. Mulderig in order to gain a tactical advantage. The government explicitly represents to the Court that the timing of the indictment was due to "the need to properly investigate a complex case involving numerous witnesses, extensive documentary evidence from several failed financial institutions, as well as interlocutory appeals to the Fifth Circuit." Government's Opposition to Motion for Evidentiary Hearing on Defendant's Motion to Dismiss at 11. As the government points out, the extensive investigation into criminal activities at Gulf Federal has continued since the original criminal complaint was received, including during the pendency of the civil case. Although, as the government admits, the case might have been brought to trial faster if a greater number of prosecutorial and investigative personnel had been available, this shortcoming does not approach the level of "intentional delay for tactical advantage" contemplated by the Fifth Circuit jurisprudence.

The government's assurances of good faith are supported by the Court's *in camera* review of United States Attorney's Office files on the case.[2] These files negate the defendant's allegation that the government intentionally delayed indictment for any illegitimate purpose.

The defendant's primary contention is that the government lulled him into testifying in the civil case by deposition in May of 1988 instead of invoking his Fifth Amendment privilege. However, in a November 1987 issue of New Orleans Magazine, U.S. Attorney John Volz was quoted as saying that some criminal violations were being investigated. Thus Mr. Mulderig had notice of a potential indictment. Despite the fact that Mr. Mulderig was represented by able counsel, he

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[2] This Court has filed four documents supporting the government's position under seal.

failed to obtain immunity or invoke his Fifth Amendment privilege. The Court is unpersuaded by defendant's allegations of government deception or trickery.

The Court, having reviewed the government's files in camera, declines to make these files available to defendant. The Court additionally finds that an evidentiary hearing is unnecessary. Defendant's Motion to Dismiss is DENIED.

New Orleans, Louisiana, this 28th day of September, 1994.

EDITH BROWN CLEMENT

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES OF AMERICA,

Plaintiff-Appellant--Cross-Appellee,

v.

WILLIAM MULDERIG,

Defendant-Appellee--Cross-Appellant.

Nos. 95-30206, 95-30253 and 97-30123

United States District Court of Appeals
Fifth Circuit

Aug. 15, 1997 Rehearsing and Suggestion for Rehearing En Banc
Denied Sept. 12, 1997

Before DAVIS, STEWART and PARKER, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This case presents the question of whether William Mulderig, a sophisticated and once successful New York entrepreneur, was properly convicted of conspiring to misapply bank funds, make false entries in bank records, and to make false statements to influence a federal agency (Count 1); of making a false statement to a financial institution (Count 2); and of aiding and abetting the misapplication of

bank funds (Count 3).[1] Although the jury also found Mulderig guilty on three additional counts of aiding and abetting the misapplication of bank funds (Counts 5, 7, and 8), the district court entered a judgment of acquittal on those counts. The Government has cross- appealed that ruling.

After a thorough review of this voluminous record, we AFFIRM Mulderig's convictions in all respects and AFFIRM the district court's judgment of acquittal on Counts 5, 7, and 8.

Background

John and Joseph Mmahat were brothers and chairman and president, respectively, of Gulf Federal Savings Bank (Gulf Federal), a federally insured financial institution located in Metairie, Louisiana. A 1983 federal audit revealed that Gulf Federal was essentially insolvent and that some of its commercial loans were unlikely to be repaid. To artificially decrease the amount of delinquent loans, the Mmahats made two sham loans to shell corporations owned by Mulderig, an attorney and entrepreneur.

The first sham loan stemmed from a transaction involving CPA Associates (CPA), an investment partnership that had acquired, through a Gulf Federal loan, a set of town homes known as Cypress Park. By late 1984, CPA was delinquent on its loan. Instead of foreclosing, the Mmahats arranged for Cypress Park to be purchased by K & K Financial Services (K & K) -- which was owned by Mulderig -- for $2,069,000; this constituted "repayment" of the CPA loan. Mulderig

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[1] Along with Mulderig, the Government obtained convictions for John and Joseph Mmahat. A prior panel of this court affirmed John Mmahat's convictions and affirmed Joseph Mmahat's convictions to the extent they supported the restitution order against him. *See United States v. Mmhat*, 106 F.3d 89 (5th Cir. 1997).

later submitted to Gulf Federal a financial statement for K & K to complete the necessary loan documentation. The statement, however, did not reflect loans of $1.4 million that another bank had made to K & K in 1984 to finance various Mulderig enterprises. The second loan was similar. Gulf Federal financed the purchase by Ronald Frank of the Nel Place apartment complex, but Frank became unable to meet his payments. Gulf Federal persuaded Mulderig to buy Nel Place and replace the failing loan with one to Dermul Management (Dermul), one of Mulderig's companies. In 1984, Frank sold Nel Place to Dermul for $1,632,730, and Gulf Federal loaned Dermul that amount plus $971,312.75, secured by a deed of trust for property Mulderig owned in New York. Neither sham loan was repaid, and Gulf Federal went into receivership in November 1986.

Procedural History

In the indictment (dated December 16, 1993), Mulderig was charged with conspiring, under 18 U.S.C. § 371, to misapply bank funds (18 U.S.C. § 657), to make false entries in bank records (18 U.S.C. § 1006), and to make false statements to influence a federal agency (18 U.S.C. § 1008) (Count 1); making a false statement to a financial institution (Count 2); and aiding and abetting the misapplication of bank funds (Counts 3, 5, 7, and 8). On November 3, 1994, a jury found Mulderig guilty on all counts. The district court denied Mulderig's motion for judgment of acquittal on Counts 1-3, but granted a judgment of acquittal on Counts 5, 7, and 8. On June 23, 1995, the district court allowed Mulderig to file a second motion for judgment of acquittal or new trial as to Counts 1-3, and this motion was subsequently denied. In August 1996, the district court granted Mulderig's motion to subpoena documents from federal regulators. Mulderig sought to prove that the Government's preindictment delay was prejudicial and done with the intent of obtaining a tactical advantage over Mulderig. After discovery, Mulderig in October 1996 filed a third Rule 29 and Rule 33 motion for judgment of acquittal or

new trial based on alleged newly discovered evidence. However, relying on the Supreme Court's decision in *Carlisle v. United States*, --- U.S. ----, 116 S. Ct. 1460, 134 L.Ed.2d 613 (1996), the district court held that it had no jurisdiction to hear Mulderig's Rule 29 and Rule 33 motions.

On December 18, 1996, Mulderig was sentenced to 54 months' imprisonment on Counts 1 and 3 and to five years' probation on Count 2, and ordered to pay restitution in the amount of $1,032,000. That same day, Mulderig filed a timely notice of appeal. The Government timely cross-appealed the district court's decision to grant judgments of acquittal on Counts 5, 7, and 8. On February 1, 1997, Mulderig filed a writ of mandamus asking us to direct the district court to exercise its jurisdiction and rule on Mulderig's third post-conviction motion for judgment of acquittal or new trial. We consolidated the writ of mandamus with Mulderig's direct appeal and the Government's cross-appeal.

Mulderig's Petition for Writ of Mandamus

Almost two months after the district court sentenced Mulderig and more than two years after his conviction, Mulderig filed a petition for writ of mandamus urging us to order the district court to exercise jurisdiction over Mulderig's third motion for judgment of acquittal or new trial. In the petition, Mulderig contended that "newly discovered evidence" proved his innocence on Counts 1-3. The district court never ruled on the merits of Mulderig's factual contentions because the district court decided that it did not have jurisdiction to rule on the substantive claims raised. We decline to issue the writ.

It is by now well established that mandamus is an extraordinary remedy reserved for those situations in which "the trial court has [1] exceeded its jurisdiction or [2] has declined to exercise it, or [3] when the trial court has so clearly and indisputably abused its discretion as

to compel prompt intervention by the appellate court." *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir.1992) (citation omitted). We shall not issue a writ of mandamus if the petitioner can obtain the relief requested on direct appeal. *See McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir.1993).

In this case, Mulderig did not seek a writ of mandamus until almost three months after the district court declined to exercise jurisdiction over Mulderig's third, post-conviction motion for judgment of acquittal or new trial and approximately two months after Mulderig was sentenced. Although the district court declined to exercise its jurisdiction (a recognized basis for issuing a writ of mandamus), once Mulderig filed his notice of appeal, the district court lost jurisdiction over this case. *See, e.g., United States v. Greenwood*, 974 F.2d 1449, 1468-69 (5th Cir.1992), *cert. denied sub nom., Crain v. United States*, 508 U.S. 915, 113 S. Ct. 2354, 124 L.Ed.2d 262 (1993). At this point, we cannot put the toothpaste back in the tube. Nonetheless, Mulderig's notice of appeal brought up all orders issued by the district court, *Trust Co. of La. v. N.N.P. Inc.*, 104 F.3d 1478, 1485-86 (5th Cir.1997) (on rehearing), and so Mulderig's claim that the district court erred in declining to exercise jurisdiction over his Rule 29 and Rule 33 motions can be remedied (if necessary) in his direct appeal.

Mulderig's Direct Appeal

In his direct appeal, Mulderig asserts a number of legal errors committed by the district court. In addition, Mulderig argues that the evidence was insufficient to support convictions on Counts 1-3. We find no legal error and conclude that the evidence was sufficient to support Mulderig's convictions on Counts 1-3. We begin with the legal issues and then proceed to Mulderig's sufficiency claims.

I. Preindictment Delay

Mulderig argues that the district court committed reversible error by not granting discovery and holding a hearing after the district court made a pre-trial finding that Mulderig suffered actual prejudice from the Government's nine-year preindictment delay. We must decide whether our *en banc* decision in *United States v. Crouch*, 84 F.3d 1497 (5th Cir.1996) (*en banc*), *cert. denied*, --- U.S. ----, 117 S.Ct. 736, 136 L.Ed.2d 676 (1997) automatically entitled Mulderig to discovery and a hearing once the district court found that Mulderig suffered actual and substantial prejudice from the Government's preindictment delay. We conclude that Crouch does not so hold.

In *Crouch*, we held that "for pre-indictment delay to violate the due process clause, it must not only cause the accused substantial, actual prejudice, but the delay must have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose." *Id.* at 1514. We neither stated nor implied that a defendant who has suffered actual and substantial prejudice as the result of the Government's preindictment delay is automatically entitled to an evidentiary hearing. Thus, we reject Mulderig's assertion that our holding in *Crouch* stands for the proposition that defense assertions of intentional preindictment delay necessarily trigger the right to discovery and a hearing.

We have held that "an in camera inspection by a district judge is a reasonable procedure and is protective of the defendant's rights." *United States v. Killian*, 639 F.2d 206, 210 (5th Cir. Unit A), *cert. denied sub nom.*, *Brunk v. United States*, 451 U.S. 1021, 101 S. Ct. 3014, 69 L.Ed.2d 394 (1981). Moreover, a district court has the right after *in camera* inspection to withhold evidence which is irrelevant or not exculpatory. *Id.* Here, the district court conducted an *in camera*, *ex parte* inspection of Government documents and found meritless

Mulderig's claim that the Government's preindictment delay was intentionally aimed at obtaining a tactical advantage over Mulderig. The district court thereafter filed the Government documents under seal. We have reviewed the information presented to the district court and conclude that there was no abuse of discretion.

II. Statute of Limitations

Mulderig next argues that Counts 1 and 2 are barred by the applicable statute of limitations. Mulderig specifically asserts that at the time of his trial and sentencing, 18 U.S.C. § 3282 applied, which barred the prosecution, trial, or punishment of a party unless the indictment was brought within five years of the offense charged. In *United States v. Barakett*, 994 F.2d 1107 (5th Cir.1993), we held that failure to assert at trial the statute of limitations defense amounts to a waiver of that defense. *Id.* at 1110. Mulderig concedes that he did not assert the statute of limitations defense until almost 110 days after the trial concluded. Under these facts, we conclude Mulderig has waived the statute of limitations defense.

III. The Alleged Brady Violation

Mulderig also argues that the government violated his rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), by suppressing material, exculpatory evidence. Specifically, he contends that the Government (1) failed to designate two allegedly exculpatory Gulf board resolutions; (2) affirmatively misrepresented the resolutions; and (3) failed to correct false testimony as to the authority of Gulf Federal officials to negotiate the final terms of loans. We disagree.

To establish a *Brady* violation, a defendant must show, among other things, that the evidence was suppressed by the prosecution. 373 U.S. at 87, 83 S. Ct. at 1196-97. However, "[w]hen information is

fully available to a defendant at the time of his trial and his only reason for not obtaining and presenting the evidence to the court is his lack of reasonable diligence, the defendant has no Brady claim." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.), *cert. denied*, 498 U.S. 1000, 111 S. Ct. 561, 112 L.Ed.2d 567 (1990) (citation omitted). Here, the government gave the defense access to 500,000 pages of documents relating to the case. One box, according to the index of documents, contained "Board Loan Committee Minutes of GFSB, Monthly Reports of GFSB, Board Minutes and Resolutions of GFSB, Executive Committee Minutes of GFSB." Among the documents were two board resolutions that purportedly gave certain officers the authority to negotiate and approve loans on whatever terms they saw fit. Mulderig's counsel copied the contents of the box and inspected the box mid-trial, but did not discover the resolutions until after the trial. After a post-trial evidentiary hearing, the district court found no *Brady* violation.

In the Mmahat appeal, we analyzed a similar claim and concluded that "there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with a larger mass of material that it has already turned over." *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir.1997). This principle controls here as well.

Mulderig argues that even assuming the government disclosed the resolutions, it violated *Brady* by misrepresenting the value of the disclosed material and by failing to correct false testimony as to the authority of Gulf Federal officials to negotiate the terms of the loans. *See Hughes v. Hopper*, 629 F.2d 1036, 1039 (5th Cir.1980) (noting that defense knowledge of exculpatory evidence may be nullified when "prosecution misleads defense into believing the evidence will not be favorable to the defendant"), *cert. denied*, 450 U.S. 933, 101 S. Ct. 1396, 67 L.Ed.2d 367 (1981). Before trial, Mulderig and his codefendants requested all *Brady* material. The government argues that

it did not produce the resolutions because it did not view them as exculpatory evidence. Because Mulderig was not a Gulf Federal employee, his case poses a closer call than that in *Mmahat*. Nevertheless, given that the Mmahats' theory of defense was that they had authority to make questionable loans, *Mmahat*, 106 F.3d at 94, Mulderig could not have been unaware of the alleged existence of the resolutions. Thus, we conclude that the nondiscovery of the resolutions was due to Mulderig's lack of diligence rather than any affirmative government misbehavior.

IV. Denial of a Fair Trial

Mulderig asserts that he was denied a fair trial because of the cumulative effect of the following alleged trial errors: a finding of no preindictment delay; a finding of no *Brady* violation; denial of a motion for severance; prosecutorial misconduct; and an erroneous evidentiary ruling. We have already rejected Mulderig's first two claims of error. Accordingly, we turn to Mulderig's remaining claims to determine whether Mulderig was denied a fair trial.

A. Denial of Mulderig's Motion for Severance

Mulderig asserts that the district court erred in denying his severance motion because of an alleged "spillover" effect that purportedly occurred through the introduction of numerous civil violations committed by his codefendants. We review the denial of a motion for severance for an abuse of discretion. *United States v. Bermea*, 30 F.3d 1539, 1572 (5th Cir.1994)

Rule 8(b) of the Federal Rules of Criminal Procedure authorizes joinder of defendants "if they are alleged to have participated in the same ... series of acts or transactions constituting an offense or offenses." *See United States v. Coppola*, 788 F.2d 303, 306 (5th Cir.1986). We have held that "[i]f defendants have been properly

joined, the district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable determination of guilt or innocence." *United States v. Bermea*, 30 F.3d at 1572. "[T]he mere presence of a spillover effect," we have reasoned, "does not ordinarily warrant a severance." *United States v. Sparks*, 2 F.3d 574, 583 (5th Cir.1993), *cert. denied*, 510 U.S. 1080, 114 S. Ct. 899, 127 L.Ed.2d 91 (1994).

We have reviewed the record and perceive no evidentiary basis for Mulderig's conclusion that damaging evidence presented against the Mmahats prevented the jury from making a reliable determination of Mulderig's guilt. Because Mulderig was an outsider to the bank, evidence of internal acts of deception could not have implicated Mulderig, especially because (1) Counts 1, 3, 5, 7, and 8 of the indictment required a finding of intent on Mulderig's part, (2) Mulderig was the only person charged in Count 2, and (3) the jury was instructed to give separate, individual consideration to the charges against each defendant. There was no abuse of discretion.

B. Alleged Prosecutorial Misconduct

Mulderig also argues that the Government failed to disclose information that would "seriously damage" the credibility of two of its key witnesses, failed to correct inaccurate testimony by one of its witnesses, failed to disclose an FBI agent's statement that documents had been lost, and presented improper argument to the jury. We have held that a new trial is warranted only when prosecutorial misconduct is so pronounced and persistent that it permeates a trial's atmosphere and casts serious doubt on the correctness of the jury's verdict. *United States v. Castillo*, 77 F.3d 1480, 1497 (5th Cir.), *cert. denied*, --- U.S. ----, 117 S. Ct. 180, 136 L.Ed.2d 120 (1996); *United States v. Wallace*, 32 F.3d 921, 926 (5th Cir.1994). We have reviewed the record and find that these four incidents in no way cast doubt on the

correctness of the jury's verdict.

C. The Allegedly Erroneous Evidentiary Ruling

Finally, Mulderig contends that the district court erred when it admitted a 1988 affidavit in which Mulderig asserted that he was liable only for attorneys' fees, interest, and costs associated with an $850,000 guaranty for the Dermul loan, and not the entire $850,000. The district court also declined to take judicial notice of Gulf's civil suit against Mulderig in which the district court held that Mulderig was liable for the entire $850,000 guaranty.

We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Asibor*, 109 F.3d 1023, 1032 (5th Cir.1997). In deciding to admit the 1988 affidavit, the district court analyzed the relevancy of the affidavit pursuant to Rule 401 of the Federal Rules of Evidence and concluded that it was relevant because it tended to show Mulderig's state of mind at the time he executed the guaranty; the district court also excluded as irrelevant the decision in the civil suit. *See Gulf Federal Savings & Loan Ass'n v. Mulderig*, 742 F.Supp. 358 (E.D.La.1989). We find that the district court did not abuse its discretion because we simply fail to see how a subsequent judicial determination of liability on the $850,000 guaranty is relevant to Mulderig's state of mind at the time he executed that guaranty.

In sum, Mulderig argues that even if no single claim entitles him to relief, the sum of the legal errors committed by the district court equals a denial of a fair trial. Our arithmetic, however, is somewhat different. We have concluded that none of Mulderig's challenges to the district court's legal conclusions has merit. Accordingly, we affirm the district court's conclusion that Mulderig received a fair trial.

V. The District Court's Denial of Mulderig's Third Post-Trial Motion for Judgment of Acquittal or New Trial

Mulderig spent two years after he was convicted trying to get his convictions on Counts 1-3 reversed. Mulderig filed three post-verdict motions for judgment of acquittal in the district court, and we must determine whether the district court properly declined to exercise jurisdiction over the third and final motion. Relying on *Carlisle v. United States*, --- U.S. ----, 116 S. Ct. 1460, 134 L.Ed.2d 613 (1996), the district court concluded that "Carlisle is controlling on the issue before the Court as Carlisle states in clear and forceful language that a district court must strictly adhere to the time limits set forth in Rule 29. The Court finds that the facts of the present case are indistinguishable from the facts of Carlisle and that defendant's motions are therefore barred by the time limits of Rule 29(c)."

Mulderig contends that the district court erroneously relied on *Carlisle* for its conclusion that his third -- in Mulderig's words, "renewed" -- motion was time-barred. We note at the outset that there is some ambiguity about whether Mulderig's third post-trial motion really sought two alternative remedies (i.e., judgment of acquittal pursuant to Rule 29 or new trial pursuant to Rule 33). For example, Mulderig's motion did not reference Rule 33 at all and did not explicitly state that he wanted a new trial; rather, Mulderig sought complete relief -- an outright acquittal on Counts 1-3. During the hearing on the motion, however, Mulderig and the Government spent some time arguing about whether the evidence proffered by Mulderig was in fact "newly discovered," a requirement found in Rule 33.

Under the circumstances, we conclude that Mulderig asserted both a Rule 29(c) motion for judgment of acquittal and a Rule 33 motion for a new trial based on newly discovered evidence. It is less clear still whether the district court actually ruled on Mulderig's Rule 33 motion for a new trial. Although the district court itself

characterized Mulderig's third motion as a motion for judgment of acquittal or new trial (thus implicating Rule 29 and Rule 33), the district court did not distinguish between the two remedies in its determination of whether it had jurisdiction to grant a judgment of acquittal or a new trial. In fact, in its written order denying the motion, the district court did not even mention Rule 33 or refer specifically to Mulderig's claim of newly discovered evidence.

Moreover, Rule 29 and Rule 33 differ in one significant respect for purposes of this appeal: the seven-day time period for Rule 33 motions not based on newly discovered evidence is identical to the seven-day time period in Rule 29. However, Rule 33 motions based on newly discovered evidence are not governed by a seven-day time frame; rather, a defendant has two years to file such a motion. Plainly, whether or not Mulderig's Rule 33 motion is premised on newly discovered evidence is critical because two different time limitations are potentially triggered.

Because the parties argued at length about Mulderig's alleged newly discovered evidence, we construe the district court's denial of Mulderig's third motion as holding that the evidence proffered by Mulderig was not newly discovered, thus triggering the seven-day time limit in Rule 33. Accordingly, we hold as follows: (1) we affirm the district court's conclusion that under *Carlisle*, Mulderig's Rule 29(c) motion for judgment of acquittal is time-barred; (2) the district court erred in concluding that the evidence presented in the third motion was not newly discovered; and (3) the district court's error is not fatal to the Government because the failure to discover the new evidence prior to or during trial was the result of a lack of due diligence on Mulderig's part.

A. Rule 29(c) and *Carlisle*

Before we address the question of whether the district court

erred in its application of the Supreme Court's decision in *Carlisle*, we first present a brief chronology of the post-trial legal wrangling leading up to Mulderig's third, post-verdict motion for judgment of acquittal.

1. Three Bites at the Apple

On November 3, 1994, Mulderig was convicted on all counts in which he was charged (Counts 1-3, 5, 7, and 8). On November 10, 1994, Mulderig moved for an extension of time within which to file a post-trial Rule 29 motion for judgment of acquittal. The district court granted the motion and gave Mulderig until November 29, 1994 to file the motion. The parties do not dispute that this motion for an extension of time was filed within the seven- day time frame prescribed by Rule 29 and that the district court had jurisdiction to grant such an extension. The Rule 29 motion was timely filed and subsequently denied on February 2, 1995.

Exactly three months after the district court denied Mulderig's first Rule 29 motion, Mulderig moved for leave to subpoena records in the custody of the New Orleans law firm of Stone, Pigman, Walther, Wittman and Hutchinson, which represented federal bank regulators in civil litigation involving Gulf Federal. The district court granted the motion on May 24, 1995. That same day, Mulderig sought leave to file a second Rule 29 motion for judgment of acquittal as to Counts 1-3. On June 23, 1995, the district court granted Mulderig leave to file the motion and continued Mulderig's sentencing pending our *en banc* consideration of *United States v. Crouch*, 84 F.3d 1497 (5th Cir.1996), *cert. denied*, --- U.S. ----, 117 S. Ct. 736, 136 L.Ed.2d 676 (1997). Mulderig's second motion was denied on July 27, 1995.

On August 22, 1995, with leave from the district court, Mulderig "renewed" his second post-trial motion for judgment of acquittal as to Counts 1 and 2. On September 14, 1995, this motion

was denied. On July 16, 1996, following our *en banc* decision in *Crouch*, the district court ruled that Mulderig's renewed motion for judgment of acquittal was moot, and sentencing was scheduled for September 4, 1996.

Not to be deterred, on August 8, 1996, Mulderig moved for leave to subpoena records in the custody of federal bank regulators. That motion was granted on August 30, 1996. On October 16, 1996, Mulderig filed a third, post-trial motion for judgment of acquittal as to Counts 1-3. This time, Mulderig argued that evidence discovered pursuant to the bank regulator subpoenas was newly discovered and demonstrated his innocence on Counts 1-3. The district court, however, denied the motion on the ground that the Supreme Court's decision in *Carlisle* divested it of jurisdiction to rule on Mulderig's third, post-trial motion for judgment of acquittal.

2. Analysis

We review de novo the district court's legal conclusion that it had no jurisdiction to entertain Mulderig's third post-trial motion for judgment of acquittal. *See Matter of Advisory Comm. of Major Funding Corp.*, 109 F.3d 219, 222 (5th Cir.1997). We conclude that the district court was correct.

Rule 29 states that a motion for judgment of acquittal "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Fed.R.Crim.P. 29(c) (emphasis added). In *Carlisle*, the defendant filed a Rule 29 motion for judgment of acquittal ten days after he was convicted and the jury was discharged. The Supreme Court strictly construed the seven-day time limitation in Rule 29 and held that the district court did not have jurisdiction to hear the motion. --- U.S. at ----, 116 S. Ct. at 1464. The *Carlisle* Court's admonition to lower courts was plain enough:

> These Rules [i.e., Rules 29 and 45(b)] are plain enough. If, as in this case, a guilty verdict is returned, a motion for judgment of acquittal must be filed, either within seven days of the jury's discharge, or within an extended period fixed by the court during that 7-day period. There is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.

Id. at ----, 116 S. Ct. at 1464 (emphasis added).

A straightforward application of *Carlisle* compels the conclusion that the district court was without jurisdiction to consider any of Mulderig's post- trial motions for judgment of acquittal after the district court granted Mulderig an extension to time (until November 29, 1994) to file his (first) post-trial motion for judgment of acquittal -- an extension of time that was properly granted within the seven-day period specified in Rule 29. The district court therefore did not err in declining to exercise jurisdiction over Mulderig's third, post-trial motion for judgment of acquittal, filed almost two years after the jury convicted him. We shall not address in any detail Mulderig's (wholly unpersuasive) arguments to the contrary, except to say that Mulderig's creative attempts to circumvent the unambiguous teaching of *Carlisle* simply rehash arguments that were rejected in *Carlisle* and border on "mak[ing] a farce" of the time limitations in Rule 29(c). *Carlisle*, --- U.S. at ----, 116 S. Ct. at 1464.

B. Rule 33 and the So-Called "Newly Discovered" Evidence

The district court's ruling regarding Mulderig's Rule 33 motion stands on a somewhat different footing. As we have repeatedly said, "[m]otions for new trials based on newly discovered evidence are

disfavored by the courts and therefore are viewed with great caution." *United States v. Sullivan*, 112 F.3d 180, 182-83 (5th Cir.1997) (internal quotations and citations omitted). As such, we have erected a relatively difficult standard -- known as the "Berry Rule" -- that defendants must meet to obtain a new trial. Mulderig must show (1) that the evidence was newly discovered and unknown to the defendant at the time of trial, (2) that his failure to discover the evidence was not the result of a lack of due diligence, (3) the evidence is material and not merely cumulative or impeaching, and (4) the evidence will probably produce an acquittal. *United States v. Sullivan*, 112 F.3d at 183 (*quoting United States v. Ardoin*, 19 F.3d 177, 181 (5th Cir.), *cert. denied*, 513 U.S. 933, 115 S. Ct. 327, 130 L.Ed.2d 287 (1994)).

Mulderig claims that the following pieces of "newly discovered" evidence demonstrate his innocence on Counts 1-3:

> (1) files from loan officer Farley "demonstrate conclusively" that the February 1985 cover letter (allegedly attached to the July 1984 financial statement) was sent to Gulf Federal in connection with an $800,000 construction loan that was separate and apart from the K & K loan at issue in the indictment; thus, argues Mulderig, he was wrongly convicted of submitting a false financial statement to government regulators (Count 2);[2] (2) although the jury was led to believe that the July 1984 financial statement was the "only" statement found in Gulf Federal's files, documents discovered post-trial (from Farley's desk) suggest that Gulf Federal's files were purged, thereby rendering unreasonable the inference that the July 1984

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[2] Mulderig also claims that because the conspiracy charge in Count 1 included the filing of the July 1984 financial statement, his conviction on Count 1 should be reversed.

> statement was attached to the February 1985 cover letter; and (3) an internal memorandum from Gulf Federal's insurers purportedly establishes that Mulderig was wrongly convicted on Count 3 because the second mortgage requirement on the Nel Place loan was "waived" by Gulf Federal officials prior to the loan closing.

Rule 33 of the Federal Rules of Criminal Procedure provides in part as follows:

> A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, . . . A motion for new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

(Emphasis added.) The district court concluded that the three pieces of evidence we have outlined above were not newly discovered, thereby subjecting Mulderig to the seven-day time limit. We have reviewed the record and conclude that the district court erred in so concluding because the evidence uncovered through the August 1996 subpoena was unknown to Mulderig at trial; it is therefore "newly discovered," thereby triggering the two-year time limit in Rule 33. And because Mulderig's third post-trial motion was filed within two years after the jury returned verdicts of guilt on Counts 1-3, Mulderig's Rule 33 motion was timely.

However, we hold that Mulderig's failure to unearth the newly discovered evidence was due to a lack of due diligence on his part. For the second time in recent memory, we are presented with defense claims of government foul play in a paper-intensive criminal prosecution for violations of federal banking laws. In *United States v. Sullivan*, 112

F.3d 180, we held that defense counsel's claim of due diligence failed largely because defense counsel was made well aware early in the trial of the Government's theory of criminal intent, yet did not at all investigate a key Government theory of guilt. *Id.* at 183. The reasoning in Sullivan applies with equal force here.[3]

As to the first two pieces of evidence, our review of the record convinces us that the issue of whether Mulderig actually submitted the July 1984 financial statement in February 1985 was hotly contested. Mulderig knew from the day the indictment was handed down that Count 1 included as part of the conspiracy the filing of the July 1984 statement as part of the conspiracy, and that the sole indictable offense in Count 2 was the filing of the (false) July 1984 K & K financial statement in order to paper the record for the Cypress Park loan. In addition, Mulderig's own attorney at a side-bar conference stated that "Mr. Farley is one of the most important witnesses in this case." Yet, Mulderig's attorneys never expressed surprise when the incriminating evidence came in, never sought a continuance to explore the matter further,[4] and never sought to obtain every document (in a document-intensive prosecution) from, in Mulderig's own words, "one of the most important witnesses in this case." We find a lack of due diligence here. *See, e.g., United States v. Sullivan*, 112 F.3d at 183.

Our conclusion is the same with regard to the third piece of newly discovered evidence. There can be no doubt that throughout this trial the issue of whether Mulderig was required to provide a second mortgage to secure the Nel Place loan was repeatedly raised.

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[3] We express no opinion on whether the newly discovered evidence demonstrates Mulderig's innocence on Counts 1-3.

[4] We note that Mulderig did seek and was denied a pre-trial continuance. However, Mulderig did not base his motion for a continuance on the issues raised now.

Furthermore, and perhaps more importantly, the issue of whether certain loan requirements could be waived was also the subject of testimony presented to the jury. But as with the first two pieces of newly discovered evidence, the failure to provide a second mortgage to secure the Nel Place loan was charged in the indictment, Mulderig showed no surprise at the introduction of evidence about the second mortgage requirement, did not seek a continuance, and did not investigate the waiver issue further. We conclude that Mulderig's failure to discover an alleged waiver of the second mortgage requirement resulted from a lack of due diligence on his part.

VI. Sufficiency of the Evidence

We finally come to the sufficiency question. This is a circumstantial evidence case pure and simple. It is by now well settled that a defendant seeking reversal on the basis of insufficient evidence swims upstream. We must affirm a judgment of conviction if a reasonable jury could conclude that the Government proved each element of the crime charged beyond a reasonable doubt. *United States v. Mmahat*, 106 F.3d at 97. We view the evidence in the light most favorable to the verdict and indulge all reasonable inferences in favor of the verdict. *Id.* Of course, the evidence need not exclude every possible theory of innocence, *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir.), *cert. denied*, 513 U.S. 870, 115 S. Ct. 193, 130 L.Ed.2d 125 (1994), and we will reverse a conviction in a circumstantial evidence case if the evidence points equally to a theory of innocence and guilt, *United States v. Sultan*, 115 F.3d 321, 325 (5th Cir.1997) (*quoting United States v. Jaramillo*, 42 F.3d 920, 923 (5th Cir.1995)). We review *de novo* a denial of a judgment of acquittal and search the record for evidence to support the convictions beyond a reasonable doubt. *United States v. Myers*, 104 F.3d 76, 78 (5th Cir.), *cert. denied*, --- U.S. ----, 117 S. Ct. 1709, 137 L.Ed.2d 834 (1997). In so doing, we apply a "rule of reason," knowing that the jury may properly rely on their "common sense" and "evaluate the facts in light

of their knowledge of the natural tendencies and inclinations of human beings." *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir.1989).

In this complex case, the competing theories offered to the jury were actually quite simple. The Government argued that Mulderig acted in concert with the Mmahats to "cook the books," leading federal regulators to believe (falsely) that Gulf Federal was on sound financial footing. Mulderig, on the other hand, contended that he had no idea that the Mmahats were engaged in foul play, that he merely negotiated a favorable business deal with regard to the loans in question, and that he simply failed in his attempt to transform bad investments into good ones.

We conclude that the circumstantial evidence presented by the Government points inexorably to the conclusion that a reasonable jury could have found Mulderig guilty beyond a reasonable doubt on Counts 1-3. We discuss the evidentiary basis for each conviction separately.

A. Count 1 -- Conspiracy to Misapply Bank Funds, to Make False Entries in Bank Records, and to Make False Statements to Influence a Federal Agency

To prove a conspiracy in violation of 18 U.S.C. § 371, the Government had to prove three elements beyond a reasonable doubt: (1) that two or more people together agreed to pursue an unlawful objective, (2) that the defendant knowingly agreed to join the conspiracy, and (3) that one of the members of the conspiracy performed an overt act in furtherance of that conspiracy. *United States v. Faulkner*, 17 F.3d at 768. The Government need not rely only on direct evidence of a conspiracy; each element may be proven by circumstantial evidence. *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir.1994). Once a conspiracy has been proven, the Government need only present " 'slight evidence' " linking the defendant to the conspiracy, *United States v. Leonard*, 61 F.3d 1181, 1187 (5th

Cir.1995) (*quoting United States v. Duncan*, 919 F.2d 981, 991 (5th Cir.), *cert. denied*, 500 U.S. 926, 111 S. Ct. 2036, 114 L.Ed.2d 121 (1991)), although "mere ... association with participants in criminal activity, without more, cannot serve as a basis for a conviction," *United States v. Sultan*, 115 F.3d at 328.

Mulderig does not dispute that the Mmahats engaged in a conspiracy to defraud federal regulators.[5] Mulderig does argue, however, that he did not knowingly participate in that conspiracy. He contends that the Government produced no evidence that Mulderig (1) knew Gulf Federal was under the watchful eye of federal regulators, thereby furthering the cover-up of nonperforming loans; (2) had a conversation with anyone in which Mulderig was asked to assume the two delinquent loans for the purpose of hiding them from federal regulators; and (3) knew about the improper purpose for which Gulf Federal had Mulderig purchase the two loans.

The district court denied Mulderig's motion for judgment of acquittal on the ground that a reasonable jury could have concluded that Mulderig conspired with the Mmahats because Mulderig knew that the two loans were problematic for Gulf Federal, that Mulderig knew Gulf Federal wanted to wipe the loans from the books by the end of 1984, and that Mulderig agreed to supply the paperwork necessary to achieve these objectives.

The evidence was sufficient to support Mulderig's conviction on Count 1. At the December 28 closing, there was some discussion about "clean[ing] up house" for federal bank examiners, who were at Gulf

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[5] Nor could he. We affirmed the Mmahats' convictions (the principal conspirators), *United States v. Mmahat*, 106 F.3d 89, and it would be an unusual result indeed if we were to conclude here that the evidence was insufficient to support a finding that the Mmahats conspired to defraud federal regulators.

Federal at the time of the K & K and Dermul closings. According to David Lichtenstein, Mulderig "indicated that he knew what [documentation] the examiners would need and would help [Gulf Federal] to come up with what was needed ... to complete [Gulf Federal's] file after the fact."[6] This testimony was substantially corroborated by a deposition Mulderig gave in 1988, in which he stated the following: " 'I know about examiners. With every banker I've ever met, they [are] always concerned that they have a file that will pass muster with the federal examiner.' " Consistent with Mulderig's knowledge of what bank examiners needed to see (and as we explain more fully below), he filed a false financial statement after the closing of the Cypress Park loan, which omitted over $1 million in loans incurred by K & K.

The evidence also showed that Mulderig was a sophisticated businessman with considerable experience in obtaining commercial loans. Yet, the record reveals that many of the documents customarily required for disbursement of commercial loans (like the K & K and Dermul loans) were either missing or incomplete. For example, Marie Sciortino testified that (1) Mulderig's December 15, 1985 financial statement noted his net worth at $13.9 million but did not list any liabilities; (2) Mulderig's November 30, 1984 financial statement was not signed; [7] and (3) Mulderig never provided Gulf Federal with

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[6] Mulderig's attorney did little to take the sting out of this testimony. In response to a defense suggestion that it was "literally unbelievable" that Mulderig would know what documents bank examiners needed to see, Lichtenstein said that Mulderig was "a very seasoned businessman" who "made a lot of loans" and therefore "understood what kind of requirements were needed."

[7] Sciortino testified that the November 1984 financial statement listed $3.5 million for which Mulderig was "jointly and severally liable." Sciortino stated, however, that she did not know whether this

income information for himself or K & K. Sciortino's testimony was corroborated by a number of other witnesses. And federal examiners Jerry Landry and John Weins testified that they were unable to locate a title opinion or title insurance for the K & K and Dermul loans, thereby suggesting that Mulderig was knowingly purchasing property without any concern whatsoever about encumbrances that could seriously diminish the value of the Cypress Park and Nel Place properties.

David Lichtenstein also testified that after Mulderig was told that a New Orleans appraiser could not produce the numbers Mulderig wanted on the Nel Place property, Mulderig suggested that Jack Birnholz, a Miami appraiser, could use a shared-equity-plan basis for the appraisal of Nel Place and thereby increase the value of the property to support the contemplated loan. Birnholz's appraisal, conducted for Mulderig himself, flew in the face of the well-established practice of providing appraisals for banks, not borrowers.[8]

Finally, Mulderig left Gulf Federal with almost $5 million in loans to purchase real estate without having to put a single penny down, something (to say the least) that was considered "unusual"; he knew the Cypress Park and Nel Place loans were problematic for Gulf Federal; he knew that he had Gulf Federal "over a barrel"; and although Gulf Federal had previously declined to loan Mulderig $850,000 to buy stock in a Pennsylvania or New York bank, Mulderig walked away from the Nel Place deal with $971,000 over and above the purchase price of the Nel Place property.

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statement referred to the $1.4 million in loans Mulderig had assumed since July 1984.

[8] The jury was also made aware of a number of other defects in the Birnholz appraisal.

In light of all of this circumstantial evidence, a reasonable jury certainly could have concluded that although Mulderig got a "sweet" business deal, that deal -- which wiped problematic loans off Gulf Federal's books -- was intended to assist the Mmahats in deceiving federal regulators into believing that Gulf Federal's financial condition was better than it actually was.

B. Count 2 -- Making a False Statement to a Financial Institution

To convict Mulderig on Count 2, the Government had the burden of proving beyond a reasonable doubt that Mulderig submitted a financial statement containing a false statement, that the false statement was material, and that Mulderig submitted the false statement knowingly and willfully, with the specific intent to influence the FSLIC. Former 18 U.S.C. § 1008 (repealed in 1989).

The parties hotly contest whether Mulderig submitted a false financial statement to Gulf Federal with the intent to dupe federal regulators into thinking that K & K was sound financially. A "Pro Forma Statement of Condition" for K & K dated July 23, 1984 omits over $1 million in loans that were incurred after July 23, 1984. This July 23, 1984 financial statement lies at the center of the controversy over Mulderig's conviction on Count 2. Specifically, on February 12, 1985, Mulderig sent a letter to Gulf Federal, which stated in part as follows: "Enclosed please find financial statements regarding William M. Mulderig and K & K Financial Services, Ltd." (Emphasis added.) The Government in this appeal and the district court when it ruled on Mulderig's motion for judgment of acquittal reason that the February 12, 1985 letter was a "cover letter" to the July 23, 1984 K & K financial statement and that in February 1985, the K & K statement was false. Mulderig, on the other hand, argues that the July financial statement was literally true and that even if it was false, the Government failed to produce any evidence that the July 1984 statement was attached to the February 1985 "cover letter."

The Government has the better argument. First, Mulderig's contention that the July 1984 financial statement was literally true is beside the point because it is undisputed that as of February 1985, K & K had approximately $1.4 million in outstanding loans, loans that did not appear on the July 1984 statement, loans that were not brought to the attention of Gulf Federal, and loans that should have been brought to Gulf Federal's attention. From this evidence, a reasonable jury could have concluded that Mulderig's after-the-fact filing of an incomplete financial statement was done for the purpose of convincing federal regulators that the K & K loan was properly documented and disbursed to a financially sound institution. *See, e.g., United States v. Stephens*, 779 F.2d 232, 237 (5th Cir.1985) (upholding conviction when defendant omitted loans from financial statement even though loans were made after date of statement).

Second, the circumstantial evidence presented by the Government shows that a reasonable jury could have concluded that the July 23, 1984 K & K statement was submitted with the February 1985 cover letter. In a memorandum from Peggy Boudreaux to Lichtenstein, Boudreaux lists various documents missing from the K & K loan file, one of which was "financials." On January 23, 1985, Lichtenstein asked Boudreaux to forward the memorandum to Farley, who recalled receiving the information. At the end of January 1985, Farley planned a trip to New York to visit Mulderig, and he prepared an itinerary of "things that needed to be covered." On that list was the notation "financials on K & K Financial Services Limited." Then came the February 12, 1985 cover letter, which stated that a K & K financial statement was "[e]nclosed."[9] Under these facts, a reasonable jury could have concluded that Farley went to New York, asked Mulderig for a K

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[9] Dala Seaman, Mulderig's office manager, paralegal, and administrative assistant testified that every financial statement requested by banks had to be (and were) authorized by Mulderig himself before the statement was sent to the requesting bank.

& K financial statement, and that the February 1985 letter included that statement.[10]

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[10] Mulderig makes much of the fact that the cover letter was not attached to the K & K financial statement, and that therefore the July 1984 financial statement could not have been included with the February 1985 cover letter. The argument has no merit because the undisputed evidence showed that the cover letter may not have been forwarded to the Credit Department along with the financial statement. Mulderig also argues that he engaged in no foul play because he disclosed his liabilities in a personal financial statement on file with Gulf Federal. Mulderig's contention is meritless. For starters, Mulderig's disclosed his liabilities in lump-sum fashion, stating that he was "jointly and severally liable for bank loans and credit of $3.5 million of several partnerships." Expert Ronald Hall testified that although such a reporting may be acceptable, it may prevent a lender from doing a thorough analysis of the creditworthiness of a borrower. Second, and perhaps most importantly, Hall informed the jury that financial statements submitted by corporations should reflect the corporation's liabilities at the time the statements are submitted to a bank. Finally, at one point, Farley testified that he could not recall whether he had a K & K financial statement at the time of the Cypress Park closing. Mulderig's attorney, however, attempted to impeach this testimony by presenting Farley with deposition testimony Farley gave in 1988, in which he (Farley) stated that he did in fact have a K & K financial statement at the closing on December 28, 1984. Presumably, if Farley had the statement in his possession in December 1984, that fact would lend credence to Mulderig's claim that he did not submit the July 1984 K & K statement for the Cypress loan in February 1985. The jury, however, did not see it that way. As Mulderig well knows, credibility calls are for the jury, and based on the evidence presented, the jury could reasonably have concluded that Farley did not have a K & K financial statement as of December 28, 1984. A number of other witnesses testified that after the first of the year (1985), Gulf Federal

Finally, we hold that a reasonable jury could have concluded that the July 1984 K & K financial statement was the particular statement submitted to Gulf Federal in February 1985. We have reviewed the record and have not found any other K & K financial statement except the July 1984 statement.

C. Count 3 -- Aiding and Abetting the Misapplication of Bank Funds by Failing to Obtain Adequate Collateral on the Dermul Loan

Mulderig argues that the evidence was insufficient to support the conviction on Count 3 because the Government failed to offer enough evidence that Gulf Federal's loan committee imposed on Mulderig a requirement to obtain a second mortgage on property in Goshen, New York. We reject this contention.

Because another panel of our court has concluded that the evidence was sufficient to support the Mmahats' conviction on misapplying bank funds by failing to obtain adequate collateral on the Dermul loan, *United States v. Mmahat*, 106 F.3d at 97-98 -- a finding we cannot disturb here -- the sole question we face is whether Mulderig aided and abetted the Mmahats in committing the offense. To support a conviction for aiding and abetting, the Government must prove beyond a reasonable doubt that "[1] the defendant's act [or actions] contributed to the execution of the criminal activity and [2] that he intended to aid in its commission." *United States v. Sultan*, 115 F.3d at 325 n. 4 (*citing United States v. Stovall*, 825 F.2d 817, 827 (5th Cir.1987)). A reasonable jury could have concluded that Mulderig promised to provide a second mortgage on the New York property with no intent of ever

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had yet to receive a financial statement from K & K and Farley was specifically instructed to travel to New York to see Mulderig and obtain such a statement.

providing it.

Mulderig knew that he was required to provide a second mortgage on property in New York because that issue was the subject of much discussion at the closing. In fact, Mulderig himself provided input to Valerie Oxner, the closing attorney, in the form of a description of the New York property. Moreover, the record shows that the agreement to provide the second mortgage was intended to protect the interests of Gulf Federal. Yet, as of March 1985, Mulderig had not yet provided that second mortgage, even though the Dermul loan proceeds had been disbursed to him. Because Mulderig was an experienced borrower, the jury could have reasonably concluded that he intended to aid the Mmahats in failing to obtain adequate security for the Nel Place loan.

The Government's Cross-Appeal

In its cross-appeal, the Government argues that the district court erred in granting Mulderig's post-verdict motion for judgment of acquittal on Counts 5, 7, and 8. We cannot agree.

We owe no deference to the district court's decision to grant a post-verdict judgment of acquittal on Counts 5, 7, and 8. *See United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 616 (5th Cir.1991). Instead, we must decide " 'whether the relevant evidence, viewed in a light most favorable to the Government, could be accepted by a jury as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.' *Id.* (*quoting United States v. Varkonyi*, 611 F.2d 84, 85 (5th Cir.), cert. denied, 446 U.S. 945, 100 S. Ct. 2173, 64 *551 L.Ed.2d 801 (1980)). As with sufficiency-of-the evidence review, the evidence need not "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.... A jury is free to choose among reasonable constructions of the evidence." *Id.*

I. Count 5 -- Aiding and Abetting the Misapplication of Bank Funds By Disbursing the K & K Loan

We held in *United States v. Mmahat*, 106 F.3d 89 that loan committee approval had not been obtained for the K & K loan. Accordingly, to convict Mulderig of aiding and abetting, the Government was required to prove beyond a reasonable doubt that Mulderig intended to aid the Mmahats in disbursing the K & K loan without committee approval.

The record is devoid of direct or circumstantial evidence that could have supported a conviction on Count 5. The record shows that communications between Gulf Federal representatives and Mulderig indicated that Gulf Federal would go forward with the K & K loan. For example, by letter dated December 5, 1984, Farley wrote Mulderig, informing him that Gulf Federal "will certify the thirty units of the [Cypress Park property] ... are termite free. At this time, you may proceed with your plans of selling the units in good faith." The Government simply failed to present evidence that Mulderig had any reason to believe that the K & K loan was not approved by the loan committee. Just because Mulderig was an experienced borrower, drove a hard bargain at the closing, and negotiated terms and conditions of the K & K loan on the day of the closing does not permit the inference that Mulderig somehow knew that the K & K loan had not been approved. Loan approval, and the process leading up to it, was a matter of internal procedure at Gulf Federal. The only evidence of Mulderig's knowledge of Gulf Federal's internal loan-approval procedure pointed to future approval of the K & K loan and not the absence of it. Accordingly we affirm the district court's judgment of acquittal on Count 5.

II. Counts 7 and 8 -- Aiding and Abetting the Misapplication of Bank Funds By Disbursing the Attorneys' Fees Loan on the Dermul Transaction (Count 7) and Disbursing the Attorneys' Fees on the K & K Transaction (Count 8)

The evidence was insufficient to support the convictions on Counts 7 and 8 for largely the same reasons supporting our conclusion on Count 5. We have combed the record and have found no direct or circumstantial evidence that would permit a jury to properly infer that Mulderig knew that the attorneys' fees loans did not receive loan committee approval.

Conclusion

Because we find no legal error and because we find the evidence sufficient to support Mulderig's convictions on Counts 1-3, we AFFIRM Mulderig's convictions in all respects. Because we further find that the evidence was insufficient to support convictions on Counts 5, 7, and 8, we AFFIRM the district court's judgments of acquittal on those counts.

APPENDIX C

UNITED STATES OF AMERICA,

Plaintiff-Appellant--Cross-Appellee,

v.

WILLIAM MULDERIG,

Defendant-Appellee--Cross-Appellant.

Crim. A. No. 93-490 SECTION "C" (5)

United States District Court, E.D. Louisiana

Sept. 6, 1994, Decided

Sept. 6, 1994, Filed, Entered

JUDGES: Berrigan

OPINION BY: GINGER BERRIGAN

OPINION: ORDER AND REASONS

The defendant, WILLIAM MULDERIG, filed a motion to dismiss the indictment against him on the basis (a) of undue pre-indictment delay and (b) prosecutorial misconduct, or alternatively to (b), to suppress his grand jury testimony on the ground of prosecutorial misconduct. The motion to dismiss for prosecutorial misconduct is DENIED. Likewise, the motion to suppress the grand jury testimony is DENIED. With respect to the claim of undue pre-indictment delay, the Court finds that the defendant has established

that he was prejudiced in fact by the delay. This ruling makes necessary a second hearing regarding the government's justification for the delay, which hearing will be conducted by Section N.

The defendant, WILLIAM MULDERIG, was indicted in 1993 on charges of conspiracy to misapply bank funds, to cause false entries to be made in bank records and to make false statements to a bank. He was also charged with the substantive offenses of making false statements to a bank, misapplication of bank funds and causing false entries into bank records.

Motion to Dismiss/Suppress for Prosecutorial Misconduct

The events underlying the indictment are alleged to have taken place between June, 1984, and May, 1985. In 1987, the defendant MULDERIG was subpoenaed before the grand jury. The subpoena "did not contain the warnings required by the United States Attorneys' Manual."[1] That Manual, issued by the Department of Justice, requires that a subpoena to a target must include an "advise of rights" form, advising him of his Fifth Amendment rights.

MULDERIG contacted an attorney. According to the defendant and the attorney, the prosecutors advised them that MULDERIG was neither a "target" nor "subject" of the grand jury investigation. After an interview with the prosecuting attorneys, MULDERIG was told that his testimony was not needed. The prosecutors allegedly apologized to MULDERIG for summoning him to New Orleans and told him they did not anticipate needing him in the future. MULDERIG did not appear before the grand jury.

MULDERIG was not contacted further regarding the

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[1] Defendant MULDERIG's original motion to dismiss, filed March 24, 1994.

investigation until August, 1992, when he was again subpoenaed for the grand jury. He alleges again he was not advised tha he was a target or subject, nor did he "receive the written warnings required by the United States Attorneys' Manual." MULDERIG did not contact an attorney this time, allegedly because he felt no need in light of his prior experience. He came to New Orleans and met with the prosecuting attorneys, who again did not tell him he was a target or subject of the investigation. At his initial appearance before the grand jury, to present documents subpoenaed, he was not advised of his Fifth Amendment rights. After the initial session, he met with the prosecuting attorneys and F.B.I. to go over the documents. He then returned to the grand jury where he was told that the grand jury was investigating several loans made by Gulf Federal Savings Bank, including loans involving him. He was also then told of his Fifth Amendment right not to testify and his right to have an attorney available for consultation. He was not advised he was a target or subject. He waived his various rights and testified at length before the grand jury. He claims that had he been advised he was in fact a target or subject, he would have invoked his Fifth Amendment right and declined to testify.

MULDERIG claims he did not learn he was a target of the grand jury investigation until mid-1993. The indictment was issued in December, 1993.

The defendant urges that the indictment be dismissed or alternatively that his grand jury testimony be suppressed because of the failure of the government to comply with the United States' Attorney's Manual and the failure of the government to advise him of his Fifth Amendment rights prior to his initial 1992 appearance before the grand jury.

As the defense candidly concedes, the failure to issue a target warning does not rise to the level of a constitutional violation. While

the court arguably has supervisory power to grant relief, that is not appropriate here. Prior to testifying substantively before the grand jury, MULDERIG was advised that loans he was involved with were the subject of the grand jury investigation. He was also advised of his Fifth Amendment rights not to testify and to have an attorney present. While he was not specifically told that he was a target or subject of the investigation, he was certainly made aware that he had some potential exposure.[2] He elected to testify apparently with the hope of convincing the government attorneys of his own lack of culpability. The fact that MULDERIG had previously been subpoenaed and did in fact contact a lawyer on that occasion indicates he was well aware of his rights. That he elected not to on this occasion was his own decision. Notable also is that MULDERIG himself was an attorney.

The motion to dismiss the indictment for prosecutorial misconduct is DENIED. The motion to suppress his substantive grand jury testimony is also DENIED.

The defendant also argues that his initial testimony before the grand jury in 1992, where he authenticated documents, should be suppressed because of the government's failure to advise him of his Fifth Amendment rights. Again, the defense is candid in acknowledging that the United States Supreme Court has not required that such an advice of rights be given under those circumstances. *See Braswell v. United States*, 487 U.S. 99, 102, 101 L. Ed. 2d 98, 108 S. Ct. 2284 S. Ct. (1988). The government likewise concedes that in certain situations such a production can have testimonial significance; if that situation develops in this case, the government agrees it cannot use MULDERIG's act of production against him. In light of that

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[2] The government, in its response, states that MULDERIG was not in fact a target or subject of the grand jury investigation at the time he testified.

concession, MULDERIG's motion to suppress is DENIED.

Motion to Dismiss for Undue Prosecutorial Delay

In order for a defendant to successfully challenge an indictment for undue pre-indictment delay, he must establish that he was actually in fact prejudiced by the delay.[3] *United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1985); *United States v. Beszborn*, 21 F.3d 62 (5th Cir. 1994). It is not enough to allege in general the loss of documents, the fading of memories or the unavailability of witnesses.

As already noted, the transactions underlying this indictment took place in 1984-1985. The indictment was not issued until the end of 1993. Defendant MULDERIG claims he was prejudiced by the delay and the indictment should be dismissed.

In order to assess the "prejudice" prong of MULDERIG's motion, it is necessary to review the factual allegation of the indictment. In the early 1980's, MULDERIG was a real estate developer, based in New York. Among his various businesses, he was a principal in two entities - Dermul Management, Ltd. ("Dermul") and K & K Financial Services, Ltd. ("K & K"). The government's theory in Count One is that the defendants conspired together to make "sham" loans from Gulf Federal to MULDERIG's "shell" companies which

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[3] If prejudice is found, then the inquiry shifts to the justification for he delay. The standard for that is not entirely clear. The government maintains that in order for the defendant to prevail, it must be shown that the government deliberately delayed bringing charges in order to prejudice the defendant. The defendant maintains that intentional conduct is not necessary and that government negligence is sufficient to justify dismissal once prejudice has been shown. That issue is not before this Court today, as already noted.

were then used to replace delinquent loans of the bank, all for the purpose of deceiving the federal examiners regarding the bank's financial condition. The indictment alleges that this conspiracy encompassed the making of false statements to the bank and false entries in the bank records as well as misapplication of the bank funds themselves. In Count Two, the defendant is alleged to have submitted a false financial statement of K & K which omitted certain outstanding debts that company had at the time of the submission; in Count Three, the defendant is alleged to have caused Gulf Federal's monies to be misapplied because a loan was made to Dermul without promised collateral from MULDERIG being provided; in Count Four, a false entry is alleged to have been made in the bank's records to conceal the fact that MULDERIG received a portion of a loan that was supposed to have been used solely for another purpose; in Counts Five, Seven and Eight, MULDERIG in alleged to have caused other misapplications of Gulf Federal funds in that the loans were not approved by the bank's loan committee and in two instances, portions of the loan went to pay legal fees of a co-defendant.

The transactions took place in 1984-1985. MULDERIG was subpoenaed to the grand jury in 1987, but after debriefing, he was told his testimony was not needed. He was not advised he was a target or subject of the grand jury investigation. He did not begin to learn otherwise until arguably 1992 when he was subpoenaed again before the grand jury and he did not learn for certain that he was a target until the middle of 1993.

MULDERIG's specific claim of prejudice is two-fold - loss of a key defense witness and loss of documents. During the time of these transactions, MULDERIG employed a certified public accountant, James Burns, whom he claims was intimately involved with the transactions at issue and in fact was the only employee fully knowledgeable about them. Around 1989, Burn was diagnosed with a terminal illness. No attempt was made by MULDERIG to preserve

his testimony as MULDERIG presumed, based on his 1987 grand jury experience, that he was not and would not be in the future under investigation. Secondly, beginning around 1990, MULDERIG's had to move his business offices and he was obliged to dispose of many of his business files, including the files regarding these transactions. Again, no attempt was made to salvage them because at the time MULDERIG perceived no need.

MULDERIG has provided substantial evidence to justify this claim of actual prejudice. According to MULDERIG's affidavit submitted with the original motion, James Burn attended all the meetings alleged in the indictment, with the exception of the December 28, 1984 meeting, as well as other meetings in connection with the loans; Burn took notes at each of those meetings and was familiar with the transactions. Burn in fact prepared the financial statement which forms the basis of Count Two of the indictment. In an affidavit submitted with his Reply Memorandum, MULDERIG goes into extensive detail regarding the involvement of Mr. Burn in his Gulf Federal dealings, including his presence at meetings and his participation in telephone conferences where the transactions at issue were discussed. MULDERIG describes discussions he had with Burn regarding the merits of the transactions, their intentions in developing the investments, their negotiations with the bank and their understandings of what was expected of them and the bank. In particular, Mr. Burn was privy to the discussions regarding the collateral for the Dermul loan and the decision to refuse to ultimately furnish it (Count Three) as well as the previously mentioned allegedly false financial statement of K & K, the subject of Count Two, which Burn in fact prepared. MULDERIG's affidavit and testimony also affirm Mr. Burn's meticulous recordkeeping of his communications and his separately maintained well-organized filing system. MULDERIG reiterated that Burn's involvement in every phase of the transactions would have verified the following: (1) MULDERIG's lack of awareness that Gulf Federal had regulatory troubles and needed to

"hide" bad loans; (2) MULDERIG's belief that the funds he received in excess of the purchase price for Nel Place was a legitimate transaction and not a "kickback" undisclosed to the bank (Count-Four); (3) that both MULDERIG and Burn were unaware of any false entries made by the bank or violations of any internal bank policies and (4) that MULDERIG was not in any kind of conspiracy with the other defendants to commit the acts alleged.

MULDERIG's affidavits also detail the loss of documents beginning in 1990 when his business office was relocated. These documents apparently included the meticulous records maintained by Burn as well as the various telephone and mail logs which verified when communications were sent and received at the office.

Attached to MULDERIG's original motion was an affidavit of Raelyn F. Hirsch, a former employee of MULDERIG. The affidavit confirmed Mr. Burn's involvement with the Gulf Federal transactions and noted that he maintained his own files on MULDERIG's business matters in his office and that he kept notes of every meeting and phone call. The Hirsch affidavit also confirmed the destruction of files beginning in 1990, caused by foreclosure on the building where their offices were located, and continuing into 1991. Her affidavit also stated that when the 1992 grand jury subpoena was received, she assisted MULDERIG in trying to locate the records requested and they could not find the phone and mail logs, the closing files of the Gulf Federal transactions, nor Mr. Burn's notes and records. The only could locate "isolated" documents regarding the transactions.

Attached to the defense Reply Memorandum is an affidavit of Patricia Ambrose, another former employee, again affirming Burn's handling of the New Orleans transactions and his detailed recordkeeping. Another affidavit came from Sandra Hirschberg, a bookkeeper in the MULDERIG office who also worked closely with Mr. Burn. She likewise verified his specific involvement in the Gulf

Federal dealings, his careful notetaking and record keeping and the separate filing system in his office.

At the evidentiary hearing, both MULDERIG and Raelyn Hirsch testified. The testimony reiterated the above and also elaborated in much greater detail the pivotal role played by Mr. Burn in MULDERIG's overall business dealings with Gulf Federal and his specific involvement with the transactions at issue in the indictment. That testimony need not be repeated here, except to say that it was persuasive to this court.

Likewise persuasive was Ms. Hirsch's description of Mr. Burn's professionalism and character. She described Mr. Burn as "straight as an arrow." (Transcript, Evidentiary Hearing, 6/22/94, p. 12, hereinafter referred to a "Transcript"). He would "double-check everything" and "took incessant notes on everything he did." (Transcript, p. 12). He was "an extremely religious man. He worked for his church. He was the accountant for his church. And he always said that, you know, there was a right way to do things." (Transcript, p. 12-13). Ms. Hirsch also described Mr. Burn's reaction when MULDERIG was subpoenaed for the 1987 grand jury appearance.

> He was annoyed . . . Mr. Burn was annoyed because he felt that we had so many other things going on in the office, that this was so ridiculous that we were going to have to spend time, or he was going to have to spend his time on doing any work on this when he felt it wasn't -- wasn't our problem. If there was some problem with the bank down in Louisiana, that was their problem, it wasn't our problem. (Transcript, p. 18).

When asked if he manifested an attitude of "oh they got us now," she said no (Transcript. p. 18). The government did not

contradict the evidence regarding Mr. Burn's professional attitude or his character.

MULDERIG maintains that Mr. Burn's testimony and the documents now lost would have established MULDERIG's good faith belief in the bona fide nature of the transactions, which would negate any illegal intent necessary for the crimes.

The government alleges that MULDERIG was not prejudiced because others could testify in lieu of Mr. Burn, including the defendant. However, MULDERIG has successfully shown that no one occupied the unique position of involvement that Burn did in MULDERIG's business affairs. Furthermore, to assert that MULDERIG's own testimony could replace Burn both ignores MULDERIG's constitutional right not to testify and ignores the obvious credibility problem he would have before the jury, should he elect to testify, as a defendant charged. Indeed, the government itself in its Post-Hearing Brief argues that MULDERIG is not credible, citing his disbarment from the practice of law and alleged misstatements in his affidavits and testimony at the hearing. All the more reason why a witness, untainted but familiar with the transactions, would have been indispensable to MULDERIG's defense. The government also argues that many of the relevant documents are still available or accessible regarding these transactions, despite the loss of MULDERIG's own business records. Apparently, the bank's documentation of the loans still exist and presumably some of MULDERIG's own filings could be reconstructed through other sources. However, MULDERIG's "good faith" defense is necessarily based on his perception of the transactions and his perception can be best gleaned from notes and records prepared and maintained in his office by himself and by his employees, in particular Mr. Burn.

The government also argues that MULDERIG has not established that Mr. Burn's testimony or the lost documents would in

fact have been exculpatory.[4] Unfortunately, this is the 'rock and a hard place' dilemma that faces any defendant claiming prejudice from a pre-indictment delay. A defendant is unaware he is under investigation and subject to indictment. He makes no attempt to preserve evidence that he maintains would be exculpatory to his defense. That evidence is then irretrievably lost, through death or destruction. He is indicted. The fact that the evidence is "gone" is the basis for the claim of prejudice. The fact that the evidence is "gone" is also the reason he may not be able to develop in detail its exculpatory nature. Were it available, there would be no claim of prejudice in the first place. To say that a defendant has a right not to be prejudiced by pre-indictment delay through the loss of evidence, then deny him the benefit of that right with an overly heavy burden to establish that the lost evidence would have been exculpatory, defeats the purpose of the motion.

Defendant MULDERIG has established, to the court's satisfaction, that he has been prejudiced by the delay in bringing this indictment, specifically in the loss of Mr. Burn as an exculpatory witness and in the loss of the supporting documentation. The evidence presented convinced the court that Mr. Burn was intimately involved

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[4] The government cites other statements made by MULDERIG in connection with other transactions where he indicates Mr. Burn's mental condition may have deteriorated prior to 1987. The timetable regarding Mr. Burn's illness and ultimate death was not clearly established at the hearing. However, Ms. Hirsch testified that Mr. Burn was "annoyed" regarding the 1987 subpoena from the grand jury and having to take time to accommodate it (Transcript, p. 18; p. 46). There was no indication, from the affidavits submitted or the evidence presented at the hearing, other than MULDERIG's suggestion in connection with another proceeding, that Mr. Burn's abilities had diminished to any degree by 1987.

with the transactions in this case and MULDERIG substantially relied upon him in that regard; that Mr. Burn had high standards of both professionalism and ethics and did not believe the transactions were illegal; that Mr. Burn kept copious notes and records of his communications, including those with MULDERIG and the officers and employees of Gulf Federal, notes and records which are no longer available.

In finding prejudice, the court does not in any way imply that the defendant MULDERIG has met his full burden in establishing that he is entitled to a dismissal of the indictment. Indeed, by establishing prejudice, he has met but the threshold requirement. Now the inquiry shifts to the justification for the delay. That inquiry requires different legal standards and different evidentiary support. The remainder of this motion is to be resolved in Section N.

New Orleans, Louisiana, this 6th day of September, 1994.

Ginger Berrigan

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

v.

JOHN MMAHAT, JOSEPH MMAHAT, JR., WILLIAM MULDERIG

ORDER AND REASONS

Before the Court is defendant William Mulderig's motion for discovery and an evidentiary hearing concerning the reasons for the government's pre-indictment delay. Mr. Mulderig argues that the Crouch opinion mandates that this Court hold an evidentiary hearing concerning the government's reasons for the pre-indictment delay. Having fully reviewed the record and the Crouch opinion, the Court determines that Mr. Mulderig's motion should be DENIED.

The Fifth Circuit has held that in order for pre-indictment delay to violate due process, the delay must cause the defendant substantial and actual prejudice that was intentionally brought about for the government for the purpose of gaining some tactical advantage. United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996). It has already been established that Mr. Mulderig suffered actual, substantial prejudice as a result of the pre-indictment delay. See decision of Judge Berrigan, September 6, 1994.

Mr. Mulderig bases his motion for an evidentiary hearing on the fact that the Magistrate Judge in the Crouch proceedings imposed

both evidentiary and discovery limitations. The Crouch en banc Court noted that because of these rulings, the Magistrate Judge had prevented the formation of a complete record from which the Court could investigate claims of bad faith by the government. United States v. Crouch, 84 F.3d at 1523 n.45.

The Fifth Circuit's concern in Crouch over a limited record from which to investigate claims of governmental bad faith is not an issue in this case. Instead, this Court has preserved an extensive record on this issue and fully investigated claims of bad faith by the government. This Court in its Order and Reasons dated September 28, 1994, found that the government did not intentionally delay indicting Mr. Mulderig. The Court conducted an in camera review of United States Attorney's Office files on the case and filed four documents supporting the government's position under seal. The Court also questioned the assistant U.S. Attorney as to the reasons for the government's delay in indicting Mr. Mulderig. From this examination, this Court found that the government's reasons for the delay, extensive documentary evidence, interlocutory appeals to the Fifth Circuit, the lack of investigative personnel, and the need to properly investigate a complex case did not rise to the level of intentional delay. (Order and Reasons dated September 28, 1994).

Because of the Court's previous Order and Reasons on this issue, as well as the well developed record, this Cour has avoided the problem addressed in the Crouch opinion. On this basis, the motion is DENIED.

New Orleans, Louisiana, this 5th day of September, 1996.

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

APPENDIX E

Nos. 96-315 and 96-319

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

A. GUY CROUCH, III, PETITIONER
v.
UNITED STATES OF AMERICA

MICHAEL J. FRYE, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A70)[1] is reported at 84 F.3d 1497. The panel opinion of the court of appeals (Pet. App. B1-B27) is reported at 51 F.3d 480. The order of the district dismissing the indictment (Pet. App. C1-C20) is reported at 835 F.Supp. 938.

JURISDICTION

The judgment of the court of appeals en banc was entered on May 30, 1996. The petition for a writ of certiorari was filed on August 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Southern District of Texas, petitioner Crouch was indicted for conspiracy to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; misapplication of bank funds, in violation of 18 U.S.C. 657 (seven counts); false entries, in violation of 18 U.S.C. 1006 (five counts), and false statements, in violation of 18 U.S.C. 1014 (five counts). On five of the 19 counts, petitioner Free was also indicted. The district court dismissed the indictment for unlawful preindictment delay. Pet. App. C1-C20. The court of appeals affirmed the dismissal. *Id.* at B1-B27. The en banc court of appeals reversed. *Id.* at A1-A70.

1. Petitioner Crouch was the chairman of the board and a loan committee member of Delta Savings Association (Delta), a federally

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[1] Unless otherwise indicated, all citations to the petition and petition appendix refer to No. 96-315.

insured savings and loan association in Alvin, Texas, from January 1985 until his resignation in September 1996. He was also Delta's attorney, as well as the half-owner, with his father, of a title company that closed Delta loans. Pet. App. A7. Petitioner Frye was a real estate investor and developer. The indictment alleged that from December 1984 to August 1985, Crouch and Robert Ferguson, a real estate broker and investor, developed a scheme to rid Delta's records of various tracts of land that Delta had acquired through foreclosure. As part of the scheme, Ferguson was required to provide persons willing to pretend to be bona fide buyers of the property and to sign loan contracts to purchase the real estate. Ferguson induced petitioner Frye and Kerry Shawell to act as sham buyers of the property on behalf of Ferguson for the purpose of avoiding limitations on loans to one borrower. *Id.* at A10-A12.

Delta failed shortly afterwards. In March 1986, federal regulators discovered petitioners' scheme while examining Delta's records. Criminal referrals issued for Carl Gerjes (Delta's president), Ferguson, and petitioners. The government initially focused its investigation on Gerjes and Ferguson, which led to Gerjes' conviction in 1989 and his guilty plea to separate but related offenses in 1992, and to Ferguson's conviction in 1992. As a result of the shortage of personnel at the local FBI office, the investigation of petitioners' case was delayed. Pet. App. A16-A17. Meanwhile, in response to the savings and loan scandal of the 1980s, in 1989 Congress extended the statute of limitations for financial institution offenses to ten years. *See* 18 U.S.C. 3293. Without that amendment, the statue of limitations for petitioners' crimes would have expired in 1990. Pet. App. A16; *id.* at D2.

In 1990, following Gerjes' first conviction and the addition of more agents to the local FBI office, the government focused its attention on petitioners' case. The instant indictment issued on November 12, 1992. Pet. App. A17-A18, B3.

2. Petitioners moved to dismiss the indictment for undue preindictment delay, in violation of the Due Process Cl use. The district court granted the motion and dismissed the indictment. The district court concluded that the delay in prosecuting petitioners was "presumptively prejudicial." It noted that several defense witnesses had died in the interim, and that several potentially important documents were missing. Pet. App. C10-C16. The district court also held that the government's explanation for the delay -- the low priority assigned to petitioners' case and a manpower shortage -- showed that it had been negligent in prosecuting petitioners. The court stated that the record did not support a finding that the delay was caused by bad faith, but stated that "bad faith" could not be ruled out. *Id.* at C13.

3. On the government's appeal, a panel of the court of appeals affirmed by a divided vote. The panel ruled that in preindictment delay cases, the defendant must show that he was actually prejudiced by the delay. If he meets that test, it is necess. to engage in a balancing of the government's reason for delay against the prejudice shown to the defendant. Applying that standard, the panel concluded that petitioners had shown actual prejudice from the deaths of several witnesses and the loss of certain bank documents. It also held that the reason for the government delay did not outweigh the prejudice to petitioners. Pet. App. B1-B27.

The en banc court of appeals reversed and ordered reinstatement of the indictment. The court ruled first that where an indictment is returned within the statute of limitations, preindictment delay does not violate due process unless, in addition to causing the defendant actual prejudice, the defendant shows that the delay was intentionally brought about the government to obtain some tactical advantage over the defendant or for some other bad faith purpose. The court rejected petitioner's argument that prejudice can be presumed from the length of the delay and that the reasons for the delay must be balanced against the prejudice to the defendant. Pet. App. A65.

Next, the court ruled that the actual prejudice requirement refers to prejudice at trial. Accordingly, a showing of possible or potential trial prejudice is insufficient. For that reason, a district court should ordinarily defer ruling on a pretrial motion to dismiss the indictment for preindictment delay until after the verdict, when the assessment of prejudice can more accurately be made. Pet. App. A66.

Applying those standards, the court ruled that petitioners did not meet either the bad faith or the actual prejudice requirements. The court concluded that the reasons for the delay -- the lack of manpower and the low priority assigned to the case -- did not constitute an effort by the government to gain a tactical advantage over the defendant or for some other bad faith purpose. Pet. App. A20-A43.

The court also held that petitioners failed to demonstrate actual prejudice. The court rejected Crouch's claim that he was prejudiced by the deaths of six potential defense witnesses. The court observed that two witnesses died in 1987 or 1988, before any delay that was even arguably undue, and that the six witnesses would not have provided information favorable to Crouch. The court ruled that Crouch's admission that he could not identify any lost documentation demonstrated that no favorable documents were lost as a result of the delay. Pet. App. A52-57. The court went on to reject Frye's claim that favorable documents were lost during the period of delay, and explained that he had made only a speculative claim of prejudice in most instances. The court acknowledged that one of the allegedly lost documents might be material to an allegation in a false statement count (Count 18) against Frye, but stated that prejudice to Frye could be obviated by striking that allegation from that count. *Id.* at A57-64.

Two judges dissented on the ground that the district court's finding of actual prejudice was not clearly erroneous, and that the government's reasons for the delay were not justified. Pet. App. A66-A70.

ARGUMENT

Petitioners contend (96-315 Pet. 6-21; 96-319 Pet. 6-7) that the Due Process Clause of the Fifth Amendment requires dismissal of the indictment against them because of prejudicial preindictment delay. There is a conflict in the circuits on the standard for determining claims of preindictment delay, but that conflict is not directly presented on the facts of this case. Under either of the competing legal standards applied in the courts of appeals, petitioners would not be entitled to relief. Accordingly, further review is unwarranted.

1. The principal protection against preindictment delay is afforded by the applicable statute of limitations. Nevertheless, the Due Process Clause "has a limited role in protecting against oppressive delay" in the filing of an indictment. *See, e.g., United States* v. *Lovasco,* 431 U.S. 783, 789 (1977). That limited protection, the Court ruled in *Lovasco (id.* at 789-790), is available only when the defendant has sustained actual prejudice from the delay, and the government's reasons for the delay are not adequate to justify going forward with a trial, in light of "fundamental conceptions of justice." *Id.* at 790-791 (citations and internal quotation marks omitted). The Court held that, while delay would not be justified where the government sought "to gain tactical advantage over the accused," *id.* at 795 (*quoting United States v. Marion*, 404 U.S. 307, 324 (1971)), investigative delay does not deprive a defendant of due process, *ibid.* Investigative delay remains justifiable even when sufficient evidence exists to seek an indictment and even when the continued investigation focuses not on the defendant himself but on other participants in related criminal activity. *See Lovasco*, 431 U.S. at 791-796. Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Id.* at 795.

The lower courts have adopted different approaches in applying

the *Lovasco* standard. As did the court below (Pet. App. A65), most courts of appeals have correctly ruled that relief is available only if the defendant is actually prejudiced and the government intended to delay the indictment in order to obtain a tactical advantage over the defendant or for some other bad faith purpose. *See e.g., United States* v. *Hayes*, 40 F.3d 362, 365,(11th Cir. 1994), *cert. denied*, 116 S. Ct. 62 (1995); *United States* v. *Stierwalt, 16 F.3d 282, 285 (8th Cir. 1994)*[2]*; United States* v. *Engstrom*, F.2d 836, 839 (10th Cir. 1992); *United States* v. *Brown*, 959 F.2d 63,66 (6th Cir. 1992); *United States* v. *Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988, *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); *United States* v. *Crooks*, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), *cert. denied*, 474 U.S. 996 (1985). That reading of *Lovasco* is consistent with this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay for the purpose of obtaining a tactical advantage. *See Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984); *Marion*, 404 U.S. at 324.

Three circuits apply a "balancing" test in assessing a due process challenge for preindictment delay. The Ninth Circuit has held that if the defendant shows prejudice, the court must then balance the

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[2] In an earlier case, which petitioner Crouch cites (Pet. 7), the Eighth Circuit appeared to endorse a balancing test weighing the reasons for the delay against the actual prejudice to the defendant, once the defendant had demonstrated actual prejudice. *United States v. Savage*, 863 F.2d 595, 598 (1988). The Eighth Circuit does not appear to have recognized the intracircuit tension between its implicit acceptance of the majority approach in *Stierwalt* and its seeming endorsement of the minority view in *Savage*. In neither case, however, did the court dismiss the indictment, as the defendants had sought.

length of the delay against the government's reasons for the delay. *See, e.g., United States* v. *Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995); *United States* v. *Valentine*, 783 F.2d 1413, 1416, (9th Cir. 1986). The Seventh Circuit has held that once the defendant shows prejudice, the burden shifts to the government to explain the reasons for the delay and that the court balances the prejudices against those reasons. *See, e.g., United States* v. *Canoy*, 38 F.3d 893, 902 (7th Cir. 1994); *United States* v. *Sowa*, 34 F.3d 447, 451 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 915 (1995). The Fourth Court has held that if the defendant shows actual prejudice from the delay, the court must balance the defendant's prejudice against the government's justification for the delay to determine whether the delay violated fundamental conceptions of justice or the community's sense of fair play and decency. *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990).[3]

The conflict in the circuits on this issue is not directly presented in this case. The circuits that apply a balancing test require the defendant to make a showing of actual prejudice before the reasons for the delay are examined. *See, e.g., Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 902; *Sowa*, 34 F.3d at 451; *Howell*, 904 F.2d at 895. As these courts have uniformly held, the defendant must establish

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[3] In *Jones* v. *Virginia*, 94 F.3d 900 (1996), the Fourth Circuit questioned whether a balancing test is the proper standard under *Lovasco*. The court noted that most of the courts of appeals do not use a balancing test, and that a balancing test appears to be inconsistent with this Court's formulation of the *Lovasco* standard in *Gouveia, Youngblood*, and *Marion*. The court recognized, however, that only the en banc court could overrule Howell. 94 F.3d at 904-905. The court ruled that under the *Howell* balancing test, the defendant was not entitled to relief. 94 F.3d at 909.

actual prejudice in the first instance before the court will weigh the length of the delay against the government's reasons for the delay. The en banc court of appeals made a thorough and detailed inquiry into the deaths of the potential witnesses and the claims of lost documents in this case, and concluded that neither petitioner had shown actual prejudice. Even if the court of appeals had followed the precedents of the Fourth, Seventh, and Ninth Circuits, it would have had no duty to undertake a balancing analysis in this case. Accordingly, because petitioners would derive no benefit from any other court of appeals' approach, the case does not present an appropriate vehicle for resolving the conflict among the circuits.

In addition, the reasons for the delay in this case do not establish a due process violation. The indictment was delayed because of a shortage of investigative agents and because the prosecutors assigned a low priority to this case. Those actions were taken in the context of the savings and loan crisis in the 1980's, during which bank fraud cases overwhelmed the federal criminal justice system. *See* Pet. App. A41. The government's delayed action did not constitute a design to obtain a tactical advantage over petitioner or some other "bad faith" reason.

Finally, the difference between the two-pronged rule adopted by most courts of appeals and the balancing test used in three circuits appears to be more theoretical than real. When the defendant fails to show that the government delayed the indictment to obtain a tactical advantage or for some other bad faith reason, *see* pp. 7-8, *supra*, or when the record affirmatively shows that the government did not delay the proceedings to obtain a tactical advantage over the accused, *see, e.g.*, *Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 901-902; *United States* v. *Automated Medical Labs, Inc.*, 770 F.2d 399, 403-404 (4th Cir. 1985), the courts that apply the balancing test have to date uniformly denied relief. While the issue presented is important and might warrant this Court's review in an appropriate case, that review

should await a case in which it becomes clear that the different tests would produce different outcomes.

2. Petitioners argue (96-315 Pet. 17-21; 96-319 Pet. 8) that because of the long delay in their case, they should be entitled to a presumption of prejudice instead of being required to show actual prejudice. That claim lacks merit. The Court has repeatedly stated that a defendant must show actual prejudice in order to establish a due process violation for preindictment delay. *See Lovasco*, 431 U.S. at 789; *Marion*, 404 U.S. at 323; *see also Gouveia*, 467 U.S. at 192.

Petitioner's reliance (96-315 Pet. 20-21; 96-319 Pet. 8) on *Doggett* v. *United States*, 505 U.S. 647 (1992), is misplaced. In *Doggett*, the Court held that a lengthy post-indictment delay is presumptively prejudicial for purposes of establishing a Sixth Amendment speedy trial claim. *Id.* at 655. The test for determining whether a defendant has been afforded a speedy trial under the Sixth Amendment, however, is not applicable in judging preindictment delays under the Due Process Clause. *Marion*, 404 U.S. at 320-321. The courts of appeals have unanimously concluded that *Doggett* has not changed the rule that requires the defendant to show actual prejudice in cases of preindictment delay. *See Jones* v. *Virginia*, 94 F.3d at 906-907 (collecting cases); *United States* v. *Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *United States* v. *Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995).

3. There is no merit to petitioner Crouch's argument (Pet. 13-17) that the court of appeals erred by instructing district courts to wait until after trial to decide whether the defendant proved actual prejudice and whether he is entitled to dismissal of the indictment. The court below reasoned that, because actual prejudice is difficult to show in the abstract, a trial court should normally wait until after trial to determine whether the defendant has shown actual prejudice that warrants dismissal of the indictment. Pet. App. A50-51. The court did not

make that an inflexible requirement because it specifically recognized that there will be cases in which it will be "clear[, and most indisputable" that the defendant suffered actual prejudice before trial that would warrant pretrial dismissal of the indictment. *Id.* at A65. The court of appeals' holding is reasonable and consistent with this Court's observations on that issue. *See Marion*, 404 U.S. at 326 ("[e]vents of the trial may demonstrate actual prejudice").[4] In any event, because at this stage of the proceedings petitioners have not shown actual prejudice from the delay, dismissal of the indictment would not be warranted.

4. Petitioner Frye contends (96-319 Pet. 9-10) that the court of appeals erred in reversing the trial court's finding of actual prejudice. The fact-bound claim merits no review.

The district court made a finding of "actual and presumptive" prejudice (Pet. App. C20), but it also concluded that it could not quantify the "actual prejudice" suffered by petitioners (*id.* at C13, C16.) In reversing the district court, the en banc court of appeals ruled that the district court erred in relying on presumptive prejudice

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[4] Petitioners' reliance (Pet. 16) on *United States* v. *Foxman*, 87 F.3d 1220 (11th Cir. 1996), is misplaced. Although the Eleventh Circuit in that case did affirm a pre-trial finding of actual prejudice, *id.* at 1222-1223, it ultimately ruled that the trial court erred in dismissing the indictment without making findings as to the reason for the delay. *Id.* at 1224. *Foxman* further observed that pre-trial dismissal for preindictment delay would be a "rare" event that the court had never found appropriate. While the court of appeals remanded for further pre-trial proceedings, it cautioned that it could not affirm a pre-trial dismissal absent "detailed findings supported by a well-developed record." *Id.* at 1224 n.4. That dictum is consistent with the view of the Fifth Circuit here. *See* Pet. App. A48 (pre-trial motion should be granted only in "the very clearest and most compelling cases").

and specifically held that the district court's findings of actual prejudice "are not supported by the record and are clearly erroneous." *Id.* at A64.

The court concluded that the district court's findings were clearly erroneous based on a thorough review of each item of evidence that petitioners claimed was lost or destroyed during the delay in filing the indictment. Pet. App. A52-A64. Petitioner Frye's assertion that the court of appeals misapplied the "clear error" standard constitutes nothing more than a factual disagreement with the court of appeals' ruling. That dispute does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX F

§ 1008. Federal Savings and Loan Insurance Corporation transactions.

Whoever, for the purpose of inducing the insurance of the accounts of any institution by the Federal Savings and Loan Insurance Corporation or for the purpose of obtaining any extension or renewal of such insurance by such Corporation or for the purpose of influencing in any way the action of such Corporation, makes, passes, utters, or publishes any statement, knowing the same to be false; or

Whoever, for the purpose of influencing in any way the action of such Corporation, utters, forges, or counterfeits any instrument, paper or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been uttered, forged, or counterfeited, or willfully overvalues any security, asset, or income, of any institution insured or applying for insurance by said Corporation—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

June 25, 1948, c. 645, 62 Stat. 751.